90-1578

NO.

FILED
APR 9 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

HELEN EHRET BACH, EUGENE G. BACH, III and JANET B. LASHLEY

Petitioners

VERSUS

TRIDENT STEAMSHIP COMPANY, INC., KAISER ALUMINUM AND CHEMICAL CORPORATION AND THE VESSEL, THE JAYMAT TRIDENT

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Should an individual, such as a bar pilot, who has historically been considered a seaman and who, at the time of the passage of the Jones Act, 46 USCA Section 688 was so considered, be denied the protection of the Jones Act for failing to meet the United States Fifth Circuit Court of Appeals' definition of "permanent" connection to a vessel or fleet of vessels in light of this Court's recent holding in *McDermott Intern., Inc. v. Wilander,* 111 S.Ct. 807 (1991).

LIST OF INTERESTED PERSONS

Counsel for petitioners, Gregory F. Gambel and Mark W. Smith of the firm, Gambel, Calvert and Smith, certify that the following listed parties have an interest in the outcome of this case. This representation is made pursuant to Rule 21.1(b) of the Rules of the Supreme Court of the United States:

NAME

1. Helen Ehret Bach

2. Eugene G. Bach, III

3. Janet B. Lashley

4. Trident Steamship Company, Inc.

5. Kaiser Aluminum and Chemical Corporation

6. The vessel, the JAYMAT TRIDENT

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Interested Persons ii

Table of Contents iii

Table and Cases of Authorities v

Reports of Opinions Delivered in Courts Below 1

Statement of Jurisdiction 1

Statement of Statutes Involved 1

Statement of the Case 3

A. Course of Proceedings and Disposition in Court Below 3

B. Statement of the Facts
1. Summary 4
2. The Pertinent Facts 5

Argument 5

CAN AN INDIVIDUAL, SUCH AS A PILOT, WHO HAS HISTORICALLY BEEN CONSIDERED A SEAMAN AND WHO, AT THE TIME OF THE PASSAGE OF THE JONES ACT, WAS SO CONSIDERED, BE DENIED THE PROTECTION OF THE JONES ACT FOR FAILING TO MEET THE UNITED STATES

TABLE OF CONTENTS (continued)

Page

FIFTH CIRCUIT COURT OF APPEALS' DEFINITION OF "PERMANENT" CONNECTION TO A VESSEL OR FLEET OF VESSELS IN LIGHT OF THIS COURT'S HOLDING IN *McDERMOTT INTERN., INC. v. WILANDER*, 111 S.Ct. 807 (1991) 5-6

Conclusion 13

Certificate of Service 15

APPENDIX A A-1

APPENDIX B A-26

APPENDIX C A-33

TABLE OF CASES AND AUTHORITIES

CASES **Page**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 250-251, 106 S.Ct. 2505, 2511-2512,
91 L.Ed.2d 202 (1986) 12

Bach v. Trident Steamship Company, Inc.,
920 F.2d 322 (5th Cir. 1991) 8

Bach v. Trident Steamship Company, Inc.,
708 F.Supp. 776 (E.D. La. 1989) 7,8

Barrett v. Chevron U.S.A., Inc.,
781 F.2d 1067, 1072-74 (5th Cir. 1986) (En Banc.) . . . 6

Butler v. Whiteman,
356 U.S. 271 (1958) (Per Curiam) 7

Cooley v. Board of Warrens, the Port of Philadelphia,
53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852) 9

Director OWCP v. Perini North River Assoc.,
459 U.S. 297 (1983) 11

Herbs Welding, Inc. v. Gray,
470 U.S. 1414 (1985) 11

McDermott Intern. Inc. v. Wilander,
111 S.Ct. 807 (1991) . . . . . *passim*

Northeastern Marine Terminal v. Caputo,
432 U.S. 249 (1977) 11

TABLE OF CASES AND AUTHORITIES (continued)

CASES **Page**

Norten v. Warner Co.,
321 U.S. 565 and 569-570 (1944) 11

Offshore Company v. Robison,
266 F.2d 769, 779 (5th Cir. 1959) 6

PC Pfeitter v. Diverson Ford,
444 U.S. 69 (1979) 11

Southwest Marine v. Gizoni,
909 F.2d 385 (9th Cir. 1990); cert. granted ____
U.S. ____, 111 S.Ct. 1071 (2/25/91) 7,8

United v. Thompson,
28 F.Cas. 102 (§16,492) (CCD Mass.) 8

United States Employees Compensation Commission,
1928 AMC 263 11

STATUTES

United States Constitution Article III 1

28 U.S.C.A. § 1254 1

33 U.S.C.A. § 902(3)(G) . . . . . *passim*

46 U.S.C.A. § 688(A) . . . . . *passim*

46 U.S.C.A. § 8501, et seq. 10

Supreme Court Rule 17 1

TABLE OF CASES AND AUTHORITIES (continued)

CASES **Page**

TREATISES

Bederman, *Compulsory Pilotage, Public Policy and the Early Private International Law of Torts*, 64 Tul. L.Rev. 1033 (1990) 8

E. Benedict, *The American Admiralty*, Sec. 278, pg. 158 (1850) 9

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, in this matter has been published in the West Reporter System as *Bach v. Trident Steamship Company, Inc.*, 920 F.2d 322 (5th Cir. 1991).

The opinion of the United States District Court for the Eastern District of Louisiana can be found in *Bach v. Trident Steamship Company, Inc.*, 708 F.Supp. 776 (E.D. La. 1989).

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under Article III of the United States Constitution and 28 U.S.C. § 1254, and the basis on which this Petition is predicated is Rule 17 of the Rules of the Supreme Court of the United States. Petitioners' claim under the Jones Act was dismissed by summary judgment on October 18, 1988. All remaining claims were dismissed and a final judgment on all issues was entered by the honorable Partick E. Carr, Judge for the United States District Court for the Eastern District of Louisiana on March 27, 1989. A timely appeal to the United States Court of Appeals for the Fifth Circuit was perfected. These dismissals were upheld by a three-member panel of the United States Court of Appeals for the Fifth Circuit on January 10, 1991. A vigorous dissent was filed by the honorable John R. Brown, Judge. Petitioners' Request for Rehearing En Banc was denied on March 4, 1991.

STATEMENTS OF STATUTES INVOLVED

This matter involves the interpretation of the following statutes or jurisprudence:

A. 46 U.S.C.A. Section 688(a), more commonly referred to as the Jones Act;

688(a) Application of Railway Employee Statutes. Jurisdiction.

> Any SEAMAN who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with a right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; in the case of the death of any seamen as a result of any such personal injury, a personal representative of such seamen may maintain an action for damages at law with a right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. This jurisdiction and such action shall be under the Court of the district in which the defendant/employer resides or in which his principal office is located.

B. 33 U.S.C.A. § 902(3)(G) commonly referred to as the Longshore and Harbor Workers' Compensation Act:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and shipbreaker, but such term does not include —
>
> (G) a master or member of a crew of any vessel;...

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

Petitioners herein, Helen Ehret Bach, Eugene G. Bach, III and Janet B. Lashley, filed suit on December 23, 1987, alleging a cause of action under the Jones Act, General Maritime Law and General Negligence for the death of Capt. Eugene G. Bach, Jr., a Mississippi River bar pilot, which occurred aboard the vessel, the M/V Jaymat Trident, on December 26, 1986 on the Mississippi River in the port of New Orleans. By supplemental and amending complaint filed October 5, 1988, petitioners brought a claim under the Longshoreman and harbor Workers' Compensation Act, 33 U.S.C.A. 905(b) in addition to the Jones Act, General Maritime and General Negligence claims.

On September 13, 1988, defendants herein filed a Motion for Partial Summary Judgment on the issues of Bach's seaman status and whether or not the warranty of seaworthiness is due a river pilot. Judgment was entered herein in favor of defendants on October 18, 1988 dismissing plaintiffs' claims under the Jones Act based on lack of seaman status and all claims for unseaworthiness under the General Maritime law.

On March 8, 1989, Trident Steamship Company, Inc. and Kaiser Aluminum and Chemical Corporation, brought a Motion for Summary Judgment on the remaining issues. This motion was granted on March 27, 1989 and plaintiffs remaining causes of action was dismissed and a final judgment as to all issues entered.

Petitioners made timely application for appeal, and on January 10, 1991, the United States Court of Appeals

for the Fifth Circuit, by a three-member panel, with the Honorable John R. Brown, in dissent, rendered its opinion upholding the decision of the court below and dismissing petitioners' claims. Petitioners applied for Rehearing En Banc which was denied on March 4, 1991.

B., Statement of the Facts

1. *SUMMARY*

Petitioners' decedent, Captain Eugene G. Bach, Jr., a Mississippi River bar pilot, had been retained by defendants, Trident Steamship Company, Inc., and/or Kaiser Aluminum and Chemical Corporation, to pilot the vessel, the Jaymat Trident, from the Port of New Orleans to the mouth of the Mississippi River in the early morning hours of December 26, 1986. Captain Bach boarded the pilot boat, the M/V Little Ray, at the Crescent City River Pilots Association headquarters and was ferried out to the Jaymat Trident at mid-stream in the Mississippi River at the Port of New Orleans. Captain Bach boarded an accommodation ladder and then climbed approximately four flights of steps to the wheelhouse. Once there, he relieved the pilot who had been taken on board ship upriver for the Baton Rouge to New Orleans leg of the voyage. Shortly thereafter, he suffered a heart attack and collapsed in the wheelhcuse of the vessel, the Jaymat Trident.

Despite the fact that the officers of the Jaymat Trident as well as the ship's medical officer were present in the wheelhouse and had been trained in first aid and cardiopulmonary resuscitation techniques, no one attempted to go to Captain Bach's aid. They simply allowed him to lay there offering no assistance. At some point in time, between 4 and 58 minutes after his collapse, Captain Bach died.

Dr. Jeffrey Hunter Phillips, head of the Cardiology Department at Tulane Medical Center, testified by deposition, that had Captain Bach received CPR within four minutes after his collapse, his chances of survival would have been much greater. Dr. Phillips' further testified that without CPR, Captain Bach had absolutely no chance of survival. It was Dr. Phillips' expert opinion that failure to perform CPR on Captain Bach deprived him of any chance whatsoever at survival. Petitioners have alleged that the failure of the officers of the Jaymat Trident to render first aid assistance and/or cardiopulmonary resuscitation, as they had been trained and instructed to do and were required to do under general maritime law, deprived Captain Bach of any chance at survival.

2. *PERTINENT FACTS*

Captain Eugene G. Bach, Jr., (hereinafter referred to as "Capt. Bach") had been a Mississippi River bar pilot for in excess of thirty years. As a bar pilot he would board vessels, either at the Port of New Orleans and guide them to Pilot Town at the mouth of the Mississippi River or vice versa. Those were his only duties. His only connection with any particular vessel would be during the time period in which he was aboard the vessel while acting as its pilot. There was no other connection between Captain Bach and the vessel, the Jaymat Trident, or any identifiable fleet of vessels other than the fact that he was in command of all the vessels he piloted.

ARGUMENT

CAN AN INDIVIDUAL, SUCH AS A PILOT, WHO HAS HISTORICALLY BEEN CONSIDERED A SEAMAN AND WHO, AT THE TIME OF THE PASSAGE OF THE JONES ACT, WAS SO CON-

SIDERED, BE DENIED THE PROTECTION OF THE JONES ACT FOR FAILING TO MEET THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS' DEFINITION OF "PERMANENT" CONNECTION TO A VESSEL OR FLEET OF VESSELS IN LIGHT OF THIS COURT'S HOLDING IN *McDERMOTT INTERN., INC. v. WILANDER*, 111 S.Ct. 807 (1991)

The United States Fifth Circuit Court of Appeals' decision in this matter is in conflict with this Court's recent decision in *McDermott Intern., Inc. v. Wilander*, 111 S.Ct. 807 (1991) rendered by this Court on February 19, 1991.

In denying seaman status and hence the protection of the Jones Act to Capt. Bach and all other pilots, the Fifth Circuit applied the two prong test it had fashioned in *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) and refined in *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1072-74 (5th Cir. 1986)(en banc). Namely, that an injured worker attains seaman statuts by proving: (i) permanent attachment to or substantial work on a vessel or an identifiable fleet of vessels and (ii) contribution to the function or mission of the vessel or identifiable fleet of vessels. The Fifth Circuit held that Capt. Bach did not meet the permanent vessel connection prong of the *Robinson-Barrett* test.

However, the Fifth Circuit went further and addressed the issue of whether or not an exception should be granted to the permanent connection requirement in situations where the maritime worker spends virtually all his time performing traditional seaman's duties, but does his work on short voyages aboard a large number of vessels such as a bar pilot. In applying this particular question to the situation in *Bach*, the Fifth Circuit, said:

> In particular, we must decide whether to exempt workers who perform traditional seaman's work on a large number of unconnected vessels from the vessel connection prong of our test for seaman status.
>
> Bach's case for seaman's status has considerable intuitive appeal for two reasons: (i) His entire job was to perform an archtypical seaman function, the steering of an oceangoing vessel through navagable waters; and (ii) in performing his job, Bach regularly faced many of the hazards of life on the sea and the risk created by moving vessels through navigable waters. To use a metaphor frequently employed in describing the stuff that makes a seaman, Bach's occupation was quite "salty" indeed. *Bach v. Trident Steamship Company, Ic.* 920 F.2d 322, 324, 325 (5th Cir. 1991).

In *McDermott Intern., Inc. v. Wilander,* 111 S. Ct. 807, this court, commenting on the connection to a vessel prong of the seaman's test held:

> We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. *Wilander,* Ibid at 817.

The *Wilander* case was the first seaman's case heard by the Supreme Court since Butler v. Whiteman 356 U.S. 271 (1958) (per curiam). Following on the heels of *Wilander* was the grant of writs in *Southwest Marine v. Gizoni,* 909 F.2d 385 (9th Cir. 1990) cert. granted ____U.S.____, 111 S.Ct. 1071 (2/25/91).[1] It becomes apparent that after

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[1] In *Gizoni,* supra, the question on which the Supreme Court granted writs was "Are employees who are in occupations specifically covered by the LHWCA nonetheless entitled to a jury trial to determine their status as Jones Act seaman?"

almost thirty-two years the Supreme Court is attempting to put to rest the problems which have plagued the circuits in attempting to determine who is a seaman entitled to the protection of the Jones Act. It is petitioners' suggestion that the instant case would be an excellant companion case to the *Wilander* and *Gizoni* cases and would provide the Court with an oppostunity to put to rest once and for all the issue of how seaman status is determined.

PILOTS HISTORICALLY CONSIDERED SEAMAN

The Jones Act does not define the word "seaman". As this Court pointed out in *Wilander,* it must be assumed that when a statute uses such term of art as "seaman", Congress intended it to have its established meaning at the time of the passage of that statute. *Wilander,* supra at 810-811.

There can be no doubt that from an historical perspective, pilots have always been considered seaman and vital to maritime commerce.[2] As early as 1832, Justice Story declared a "cook and steward as seaman in the sense of the maritime law, although they have peculiar duties assigned them. So a *pilot,* a surgeon, a ship's carpenter and a boatswain, are deemed seaman, entitled to sue under admiralty." *United v. Thompson,* 28 F.Cas. 102 (#16,492) (CCD Mass). [Emphasis Added]

Shortly thereafter, the leading admiralty treatise of the time noted the wide variety of those eligible for seaman's benefits:

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[2] See Bederman, *Compulsory Pilotage, Public Policy and the Early Private International Law of Torts,* 64 Tul.L.Rev. 1033 (1990). See also Judge Brown's scholarly treatise in his dissent in *Bach v. Trident Steamship Company, Inc.,* 920 F.2d 322 (5th Cir. 1991).

> Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, *pilots,* firemen, deck hands, waiters...women as well as men,...are mariners. E. Benefict, the American Admiralty Section 278, Pg. 158 [1850] [Emphasis Added]

Perhaps the strongest declaration as to the status of pilots came in *Cooley v. Board of Wardens, the Port of Philadelphia,* 53 U.S. (12 HOW.) 299, 13 L.Ed 996 (1852). Dealing with compulsory bar pilots the Supreme Court held:

> Now, a pilot, so far as it respects the navigation of the vessel and that part of the voyage which is his pilotage-ground, is a temporary master charged with the safety of the vessel and cargo, and the lives of those aboard, and entrusted with the command of the crew. He is not only one of persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. If Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true, that according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different states or between ports between the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate in navigation extends to him while thus engaged, as clearly as if he were there to remain on board through the whole passage from port to port. *Cooley,* ibid.

Clearly at the time of the passage of the Jones Act, 46 U.S.C.A. § 688 in 1920, pilots had long been considered seaman. To deny them this status now for failure to meet the permanent connection prong of the *Robison-barrett* test would be to ignore the reality of the fact that they are now and always have been considered seaman. Such a test that flies in the face of reality is flawed and must be re-examined.

COVERAGE OF PILOTS UNDER LHWCA

For further aid in determining who exactly is a "seaman" you must look to the terms of the Longshore Harbor Workers' Compensation Act, 33 U.S.C.A. Section 901 et seq. The LHWCA provides recovery for injury to a broad range of land based maritime workers, but expressly excludes from its coverage, "a master or member of a crew of any vessel". 33 U.S.C.A. 902(3)(G). Master or member of a crew is a refinement of the term "seaman" under the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. It is now recognized that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land based and sea based maritime employees. *Wilander*, supra, at 813-814.

As the Jones Act and LHWCA are mutually exclusive, bar pilots must fall under either one or the other. Therefore, it is instructive to determine whether or not Captain bach is in fact covered under the LHWCA.[3]

The LHWCA is intended to cover longshoremen, ship repairmen, ship breakers and like class of employees

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[3] It is of extreme interest to note that federal laws defining and regulating pilots are found at 46 U.S.C.A. 8501 et seq., under the subtitle "Manning of Vessels" and not under Title 33 where the LHWCA is found.

commonly known as longshoremen, engaged in loading, unloading, refitting and repairing ships. *Norton v. Warner Company,* 321 U.S. 565 and 569, 570 (1944). The term "maritime employment" not otherwise defined by the act, added by the 1972 amendment to the LHWCA has been interpreted as referring to that work akin to traditional longshoring operations, but shore based. The addition of this phrase is intended to correct the anomaly under previous case law whereby a workers' eligibility for benefits under the LHWCA act depended on which side of the shoreline he was on when he was hurt. *Herb's Welding, Inc. v. Gray,* 470 U.S. 1414 (1985); *Director OWCP v. Perini North River Associates,* 459 U.S. 297 (1983); *PC Pfeitter v. Diverson Ford,* 444 U.S. 69 (1979); *Northeastern Marine Terminal v. Caputo,* 432 U.S. 249 (1977). It is clear that pilots do not fall within the ambit of activities described above. Furthemore, there is persuasive jurisprudence which specifically excludes pilots from the coverage of the LHWCA.

As early as 1927, soon after the adoption of the Longshore and Harbor Workers' Compensation Act and only seven years after passage of the Jones Act, the United States Employees Compensation Commission, charges with implementing the LHWCA, issued an opinion that a temporary pilot is included within the term "master or member of a crew" and is thus not covered by the LHWCA. 1928 AMC 263

In examining whether or not temporary pilots should be considered masters or members of a crew and covered by the LHWCA, the Compensation Commission stated:

The question submitted to the United States

> Employees Compensation Commission was whether or not injury to pilots boarding vessels at sea or in port come within the compensation benefits of the Longshore and Harbor Workers' Compensation Act. The pilots referred to are those taken aboard a vessel for the purpose of conducting such a vessel into or out of a port. 1928 AMC 263.

The Commission then went on to examine several decisions on the nature of pilotage and the duties of pilots and concluded as follows:

> With these decisions, it appears that the pilot merely takes over for the time being some of the duties pertaining to navigation which fall upon the master. It is concluded, therefore, that a pilot is included within the term "master or member of the crew" as that term is used in the Longshore anf Harbor Workers' Compensation Act and that he is specifically exempted from the act. 1928 AMC 263, 264.

It is clear that pilots, such as Capt. Bach, do not fall within the ambit of the LHWCA.

APPROPRIATENESS OF SUMMARY JUDGMENT

Capt. bach's claim to seaman status under the Jones Act was denied by means of summary judgment. It is respectfully submitted that this determination should have been left for the jury.

If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew", seaman's status is a question for the jury. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

250-251, 106 S.Ct. 2505, 2511-2512, 91 L.Ed. 2d 202 (1986). The inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel, and the employees precise relationship to it. See *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190, 72 S.Ct. 216, 218, 96 L.Ed. 205 (1952). The many cases turning upon the question whether an individual was a "seaman" demonstrates that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury. *Desper v. Starved Rock Ferry Co.*, Ibid.

There is absolutely no doubt or dispute as to the maritime nature of the work performed by a bar pilot. Also, bar pilots are not one of those class of workers specifically enumerated in the LHWCA. Therefore, it is respectfully suggested that reasonable persons could in fact find that pilots are seamen and entitled to the protection of the Jones Act. This determination should have been left for the jury as it was not appropriately decided on summary judgment.

CONCLUSION

It is difficult to imagine any single individual more vital to maritime commerce then the bar pilot. All voyages begin and end with the bar pilot performing his maritime duties. Historically considered seamen and entitled to the rights, benefits and privileges of seamen, pilots should be afforded the protection of the Jones Act.

If the United States Court of Appeals for the Fifth Circuit's decision in this case is allowed to stand, an entire class of maritime workers, absolutely vital to maritime commerce, would be left without protection or remedy for death or injury. With the historic interest Congress and the Courts have shown in the welfare of those vital to such

seaborne commerce, it would be a gross dereliction to prevent Capt. Bach and all other bar pilots, such as himself, from being considered seamen.

At the very least, the jury should have been allowed to determine whether or not Capt. Bach was in fact a seaman. Summary Judgment was not appropriate in this instance.

RESPECTFULLY SUBMITTED:

GAMBEL, CALVERT AND SMITH

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Robert H. Murphy of the Law Firm of Chaffe, McCall, Phillips, Toler and Sarpy on Tuesday, April 9, 1991.

_____

GREGORY F. GAMBEL

APPENDIX A

Helen Ehret BACH, Eugene G. Bach, III,
Janet B. Lashley,
Plaintiffs-Appellants,

v.

TRIDENT STEAMSHIP COMPANY, INC., et al.,
Defendants-Appellees.

No 89-3298.

United States Court of Appeals,
Fifth Circuit.

Jan. 10, 1991.

Survivors of compulsory river pilot, who suffered fatal heart attack after boarding vessel, brought action for damages. The United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., 708 F.Supp. 776, granted defendants' motion for summary judgment, and appeal was taken. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) pilot was not "seaman" for purposes of Jones Act, and (2) survivors could not maintain negligence action under the Longshore and Harbor Workers' Compensation Act.

Affirmed.

Brown, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, JOLLY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The survivors of Eugene G. Bach, Jr. appeal the summary judgment dismissal of their claims made under the Jones Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law. 708 F.Supp. 776 (E.D.La.1989). We affirm.

I. FACTS

On December 26, 1986, Eugene G. Bach, Jr. came aboard the M/V JAYMAT TRIDENT to serve as its compulsory river pilot between New Orleans and Pilottown, near the mouth of the Mississippi River. Bach arrived alongside the M/V JAYMAT TRIDENT in a small pilot boat and ascended a pilot ladder to the ship's deck. Although Bach arrived safely on the bridge, he collapsed from a heart attack a few minutes later. The crew summoned medical help from shore, but no one attempted to aid Bach although several had been trained in cardiopulmonary resuscitation techniques.

Bach's survivors brought suit under the Jones Act, the Longshore and Harbor Workers' Compensation Act, and the general maritime law. All of their theories centered upon the adequacy of the pilot ladder and the failure of the crew of the vessel to render medical aid to Bach. The trial judge dismissed their claims, and this appeal followed.

II. JONES ACT

[1] Only a "seaman" may assert a negligence action under the Jones Act. 46 U.S.C.App. §688.[1] An injured

[1] Because we decide that Bach is not a seaman, we need not consider whether Trident Steamship Inc. Company was his employer for purposes of the Jones Act.

worker attains seaman status by proving: (i) permanent attachment to or substantial work on a vessel or an identifiable fleet of vessels and; (ii) contribution to the function or mission of the vessel or an identifiable fleet of vessels. *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1072-74 (5th Cir.1986) (en banc); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959).

[2] Bach's survivors do not seriously argue that he was permanently attached to or did substantial work on board the M/V JAYMAT TRIDENT. The record clearly reveals that he fulfilled neither requirement. His transitory work aboard the M/V JAYMAT TRIDENT, which lacked any degree of regularity and continuity, does not constitute either permanent attachment to or substantial work aboard that vessel. See *Barrett*, 781 F.2d 1073-74.

Bach's survivors argue that he is not required to establish a connection to the M/V JAYMAT TRIDENT because he can prove the requisite connection to a "fleet" of vessels that includes the M/V JAYMAT TRIDENT. See *Barrett*, 781 F.2d at 1074; *Braniff v. Jackson Ave.—Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir.1960). In *Barrett*, we defined "fleet" for these purposes as an "identifiable group of vessels acting together or under one control." *Barrett*, 781 F.2d at 1074. The only apparent connection between the vessels Bach piloted was that they traversed a stretch of the Mississippi River between New Orleans and Pilottown. Ordinarily, this would hardly constitute a fleet. But Bach's survivors contend that because each vessel he worked aboard was under his control when he piloted it, the aggregation of the vessels he worked aboard constitutes a fleet.

We made it clear in *Barrett* that "fleet" means more than simply "any group of vessels an employee happens to

work aboard." 781 F.2d at 1074. Bach's "control" argument is no more than an attempt to make a "fleet" out of all the vessels he worked aboard. *Barrett's* definition and explanation of "fleet" forecloses this argument. This group of vessels is not a "fleet."

[3] While Bach fails the vessel connection prong of the *Robison-Barrett* test, we have specifically reserved decision on whether an exception to that test might be made in a case such as Bach's:

> We do not decide whether the same principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties—work closely related to the movement of vessels—but does his work on short voyages aboard a large number of vessels.

Barrett, 781 F.2d at 1075 n. 13. The question we reserved in *Barrett* faces us today. In particular, we must decide whether to exempt workers who perform traditional seaman's work on a large number of unconnected vessels from the vessel connection prong of our test for seaman status.

Bach's case for seaman status has considerable intuitive appeal for two reasons: (i) his entire job was to perform an arche-typical seaman function, the steering of an oceangoing vessel through navigable waters; and (ii) in performing his job, Bach regularly faced many of the hazards of life on the sea and the risks created by moving vessels through navigable waters. To use a metaphor frequently employed in describing the stuff that makes a seaman, Bach's occupation was quite "salty" indeed.

Although some of our seaman status cases discuss the perils of the sea that the worker faces, we have never held that seaman status is coextensive with exposure to seaman's risks. We have frequently refused to extend seaman's protections to workers exposed to a seaman's perils but who lacked the requisite connection to a vessel or identifiable fleet of vessels. See *Ardleigh v. Schlumberger Ltd.*, 832 F.2d 933, 934 (5th Cir.1987) (employee who worked offshore on thirty unconnected vessels denied seaman status); *Lirette v. N.L. Sperry Sun, Inc.*, 831 F.2d 554, 555-56 (5th Cir.1987) (worker who spent seventy-five to eighty percent of his working time aboard unconnected moveable drilling rigs not a seaman); *Langston v. Schlumberger Offshore Services, Inc.*, 809 F.2d 1192, 1194 (5th Cir.1987) (worker who performed work on fifteen vessels belonging to ten different owners not a seaman). We have also refused to extend seaman status to a variety of workers who undeniably faced the perils of the sea but who worked on a structure that did not qualify as a "vessel." See *Reynolds v. Ingalls Shipbuilding Div., Litton*, 788 F.2d 264, 267 (5th Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 278, 93 L.Ed.2d 253 (1986) (ship on sea trials not a vessel "in navigation," and therefore those working aboard ship during sea trials not seamen); *Reeves v. Offshore Logistics, Inc.*, 720 F.2d 835, 836-37 (5th Cir. 1983) (helicopter not a vessel and therefore offshore helicopter pilot not a seaman).

Similarly, we have not granted seaman status to workers who performed the work usually or traditionally done by seamen but who lacked connection to a vessel or fleet of vessels. To the contrary, we have always required those workers performing traditional maritime functions to satisfy the vessel connection test. In *Fazio v. Lykes S.S. Co., Inc.*, 567 F.2d 301 (5th Cir. 1978), we denied seaman status to a shoregang worker who performed traditional

seaman's work but who lacked the requisite vessel connection. Similarly, in *White v. Valley Line Co.*, 736 F.2d 304 (5th Cir. 1984), we refused to grant seaman status to an injured fleetman at a barge fleeting facility who spent almost all of his time aboard various barges doing seaman-type work—handling tow lines, and cleaning and repairing barges—but who could not show connection to a vessel or identifiable fleet of vessels. Thus, to grant Bach an exemption from establishing connection to a particular vessel or fleet of vessels would be inconsistent with a long list of cases from this court.

Granting Bach an exception to the vessel connection requirement would also draw us farther away from other circuits. Although *Robison* and *Barrett* only require the worker to establish that he aided in the accomplishment of the mission of the vessel, several other circuits adhere to the narrower "aid in navigation" test or a similarly stringent requirement. *See Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 523 (9th Cir.1989); *Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1062-63 (7th Cir.1984), *cert. denied*, 469 U.S. 1211, 105 S.Ct. 1180, 84 L.Ed.2d 328 (1985); *Simko v. C & C Maintenance Co.*, 594 F.2d 960, 964-65 (3rd Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979); *Whittington v. Sewer Const. Co.*, 541 F.2d 427, 436 (4th Cir.1976). To further weaken our test by excusing workers engaged in traditional maritime work from establishing vessel connection would only widen the gap between this court and most other circuits in the proof required to establish seaman status.[2]

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[2] We note that the Supreme Court has granted certiorari in one of our Jones Act seaman cases, apparently to resolve this conflict among the circuits. *See Wilander v. McDermott Intern, Inc.*, 887 F.2d 88 (5th Cir.1989), *cert. granted in part*, ____ U.S. ____, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990).

Further, such an exception for workers engaged in traditional maritime work would be difficult to apply and would unnecessarily inject uncertainty and ambiguity in our circuit's test for seaman status. For example, would harborworkers, particularly those engaged in occupations not enumerated in the Act[3] who perform essential vessel functions traditionally performed by the crew and who sometimes face seaman-type risks, be entitled to have a jury ponder whether they are seamen? For over thirty years, this circuit has struggled to provide a workable test for distinguishing seamen from other maritime workers in maritime injury cases. A large body of law, developed through a case-by-case application of the *Robison* test, provides the means for deciding which workers are entitled to the benefits of the Jones Act. Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels. We decline the invitation now to make a wholesale exception to a test that has served us for so long.

In short, to create an exception for a worker such as Bach who has the duties and faces the risks of a traditional seaman but who lacks requisite vessel connection would include all sorts of workers we have previously excluded, would widen the divergence of views between our circuit and others, and would make our seaman test unnecessarily uncertain and ambiguous. We therefore decline to make such a radical change in this circuit's test for Jones Act coverage. The district court correctly determined that no genuine issue of fact remained and that Bach was not a seaman as a matter of law.

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[3] See *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir.1987), *cert. denied*, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988).

III. OTHER MARITIME REMEDIES

A. Section 905(b) of the LHWCA

Bach's survivors also assert a negligence action against Trident Steamships under section 905(b) of the LWHCA. They make two arguments: (i) that the crew and owners of the M/V JAYMAT TRIDENT negligently provided a substandard boarding ladder; and (ii) that the crew of the TRIDENT were negligent in failing to administer cardio-pulmonary resuscitation (CPR) to him after his heart attack.

1. Adequacy of the Boarding Ladder

[4] Bach's survivors assert that the crew was negligent because it failed to provide him with an appropriate means of boarding the ship. They rely on two regulations concerning pilot ladders. The two regulations—one a part of the Safety of Life at Sea Convention (SOLAS) and a nearly identical Coast Guard regulation—require that when the distance from the water to the ship's deck exceeds thirty feet, "access from a pilot ladder to the [vessel or ship] must be by way of an accommodation ladder" or by an "equally safe and convenient means." Safety of Life at Sea Convention, 1974, Multilateral, Ch. 5, Regulation 17(a)(ii), 32 U.S.T. 47, 243, TIAS No. 9700, reprinted at 6B Benedict on Admiralty, doc. 14-8, at 14-400; 46 C.F.R. 96.40-1(g). The SOLAS regulation also requires a pilot ladder to be secured so that "the pilot can gain safe and convenient access to the ship after climbing . . . not more than 9 metres (30 feet)."

Bach's survivors point out that the free-board of the M/V JAYMAT TRIDENT was approximately thirty-two feet and that no accommodation ladder or similar device

was provided for Bach's ascent. Therefore, they contend, both the SOLAS regulation and the Coast Guard regulation were violated.

We conclude that these regulations were not violated. The regulations do not prohibit pilot ladders more than thirty feet in length; nor do they prevent the use of a pilot ladder when the vessel's freeboard exceeds thirty feet. The obvious intention of these regulations is to limit to thirty feet the distance a pilot can be required to climb a pilot ladder. It is only after the pilot has climbed thirty feet of pilot ladder that an accommodation ladder or other similar device is required.

It is undisputed that Bach began his ascent of the pilot ladder at least eleven feet above the water level. Bach therefore climbed considerably less than thirty feet on that ladder. Because Bach was required to climb less than thirty feet on the pilot ladder, no accommodation ladder or other device was required. Hence, Bach's section 905(b) claim based on violation of these regulations fails.

2. Failure of the crew to administer CPR

[5] Bach also asserts a negligence claim based on the failure of the crew to administer CPR to him. Undisputed medical testimony indicates that Bach had no more than a fifteen percent chance of surviving even if the crew had rendered CPR and electrical defibrillation had been available. From this uncontradicted evidence, no rational factfinder could conclude that the crew's failure to administer CPR more likely than not caused Bach's death. See W. Keeton, Prosser and Keeton on Torts section 41, at 269 (5th Ed.2984) ("plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant

was a cause in fact of the result"); Re-statement (Second) Torts sections 431, 433 comment b (1965).

Bach's survivors seek to avoid this factual weakness by urging this court to adopt a special rule of causation, the "loss of a chance of survival" doctrine. Under this doctrine, which as far as we can tell, has been confined to medical malpractice cases, plaintiffs who cannot meet the ordinary standards of causation are allowed to recover for negligent conduct that decreases their chances of survival. See generally Annotation, Medical Malpractice: "Loss of Chance Causality," 54 ALR 4th 10 (1987).[4]

We decline the invitation to apply this doctrine in this section 905(b) case, well beyond the context in which it has been developed.

Bach has therefore failed to prove causation and failed to persuade us to adopt the loss of a chance of survival doctrine. He therefore may not recover in negligence for the failure of the crew to administer CPR.

B. Unseaworthiness

[6] Bach's survivors contend that they may bring an unseaworthiness action based on the "*Sieracki*"seaman doctrine. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). The *Sieracki* doctrine sur-

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[4] Bach's survivors also rely on *Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir.1962), *cert. denied*, 372 U.S. 913, 83 S.Ct. 728, 9 L.Ed.2d 721 (1963), in which the Fourth Circuit discussed the duty to attempt rescue of an overboard Jones Act seaman. We read *Gardner* as enforcing a special duty imposed by the Jones Act. Because Bach is not a Jones Act seaman, that special duty has no relevance.

vives only in favor of maritime workers who are not covered by the LHWCA. See *Aparicio v. Swan Lake*, 643 F.2d 1109, 1118 (5th Cir.1981). However, the record before us does not clearly reveal whether Bach was an LHWCA-covered worker.[5] We therefore address his claim on the merits.

Unfortunately for Bach's survivors, this claim is nothing more than their negligence claim recast in terms of the warranty of seaworthiness. They assert that the vessel was unseaworthy because it did not have the type of ladder prescribed by SOLAS and Coast Guard regulations. As we have already noted, undisputed summary judgment evidence shows there was no violation. Hence, the unseaworthiness claim must fail as well.

AFFIRMED.

JOHN R. BROWN, Circuit Judge, dissenting:

Disregarding nearly a thousand years of maritime lore, enactments and codes of worldwide maritime nations, congressional enactments and Supreme Court decisions, the Court holds that a state compulsory pilot—the preeminent, indispensable member of the ship's company in controlling and directing the immediate navigation of a vessel—is not a statutory Jones Act[1] seaman.

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[5] The LHWCA covers those "engaged in maritime employment." 33 U.S.C. §§ 902(3), 903. The record does not clearly show that Bach was the employee of anyone. It is, therefore, unclear whether the LHWCA covered him.

1. 46 U.S.C. App. § 688:

> Recovery for injury to or death of seaman (a) Application of railway employee statutes; jurisdiction

I cannot turn my back on this maritime tradition and compelling precedent. I am compelled to dissent.[2]

I.

The Pilot—A Hoary Figure

Dependent as the nation is, in large part, on the rich history and traditions of maritime law as it has been developed over the centuries amongst maritime nations in the aim generally for some universal, worldwide application, the maritime lore has exceeding importance.

Amongst the most ancient and venerable are the Rules of Oleron[3] to which the reknowned expositors of maritime law, ancient and contemporary, Gilmore and Black,[4] remind us that the rules have "always been regarded as having an especial importance for the maritime law of England, and hence for that of the United States. . . . [O]nce in a while, when more recent authority fails, a court may look back to them, and especially to the Rules of

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(Footnote 1 continued)

Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages . . . with the right of trial by jury, and in such action . . . [Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., shall apply]

2. As set forth in part III I concur in the balance of the Court's opinion.

3. *See* Peters, Admiralty Decisions in the District Court of the United States for the Pennsylvania District (1807), Appendix to Vol. I, lxvii-xc (reprinted in 30 F.Cas. 1171). See also, GILMORE & BLACK, THE LAW OF ADMIRALTY, p. 7, n. 22 (2d Ed.1975) [hereafter G & B].

4. G & B, *supra* n. 3, at 6-7, nn. 20-22.

Oleron, for what analogical help may be vouchsafed."[5]

Although Gilmore and Black emphasize that "the most interesting of all these medieval maritime codifications . . . is . . . the Rules of Oleron,"[6] the Supreme Court did not confine itself so narrowly. In the really landmark case of *Cooley v. Board of Wardens*[7]—a case which resurrects vivid recollections in every lawyer, teacher, and judge as students of constitutional law—the Court had to determine and upheld the constitutionality of the Act of 7th of August 1789, § 4.[8]

The Court in what might have been frowned on by scholars, law review editors and those beholden to Blue and White books, referred specifically to

> [n]umerous laws of this kind . . . cited in the learned argument of the counsel for the defendant in error; and their fitness, as a part of a system of pilotage, in many places, may be inferred from their existence in so many different states and

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5. *Id.* at 7. *See also,* BENEDICT ON ADMIRALTY (7th Ed.1989) [hereafter BENEDICT], Laws of Oleron, § 6, p. 1-21, n. 1. BENEDICT summarizes Zouch's six-part general classification of the Rules of Oleron:

6. Touching the charge for hiring pilots, and their duty.

Id. at § 27, p. 2-6.

6. G & B, *supra* n. 3, at 6-7.

7. 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852).

8. Quoted in 53 U.S. at 317, 13 L.Ed. at 1004:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." (Codified as amended at 46 U.S.C. § 8501(a).)

and countries.[9]

Laws of Oleron are Exacting as to Pilots

Whatever the authenticity of the author, Eleanor of Aquitaine, mother of Richard the Lionhearted, or the actions of Eleanor in the Holy Land,[10] Article XXIII is graphic, not only in the implication that a pilot must be aboard for voyages through localized waters, but in the seriousness of the pilot's occupation which holds him

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9. 53 U.S. at 312, 13 L.Ed. at 1002. As did the Supreme Court, I accept without further documentary authentication these ancient codes as listed in excerpts from counsel's briefs:

> I. European. 1st Hanseatic Ordinances (about A.D. 1457), ch. 25. Captain to take pilot under penalty (amende) of one mark of gold. II. 486. 2d. Maritime Law of Sweden (about A.D. 1500). Captain to take a pilot, and if he neglects to do so, shall pay one hundred and fifty thalers, one third to the informer, one third to the sufferer (plaignans) or pilot offering, and one third to the poor mariners. Cap. 7, III. 172. 3d. Maritime Law of Du Pays Bas. Captain to take pilot, under penalty of fifty reals, and be responsible for any loss to the vessel. Cap. 24, tit. 9, IV, 83. 4th Maritime Law of France. Ordinances Louis XIV. A.D. 1681, ch. 26. If the mariners refuse a pilot, they shall suffer corporal punishment, and the one who tenders himself must be employed. And provides also for the examination of pilots by competent persons. IV. 395. Moreover, they who are engaged in navigating royal vessels into ports or rivers have not the option of taking or refusing a pilot; in the same case merchant vessels are required to take pilots, under the penalty of fifty livres, to be applied to the Marine Hospital, and the repairing of any damage from stranding. Art. 5, tit. 1, livre II. Ordinance of April, 1689; *see* Repertoire de Jurisprudence, tome 9, p. 236.

53 U.S. at 308, 13 L.Ed. at 1000.

10. G & B, *supra* n. 3, at 7, n. 23. Compare BENEDICT, *supra* n. 5, § 26 at 2-5 to 2-6, which states that the Rules of Oleron were:

> "...made by Richard the I [the Lionhearted], King of England, on his return from the Holy Land ... for the better regulation of *merchants, owners, and of ships, and mariners, and all seafaring persons in maritime affairs.*"

of the consequences of his dereliction as pilot including, if his purse is not adequate, the loss of his head:

Art. XXIII

If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head.[11]

Who is a Pilot?

Here I am dealing primarily with those localized persons who come aboard the ship to assure successful navigation of the vessel through the local shoals, eddies, sandbars, influence of localized tides, wind, currents and the ever-growing industrial installations emerging from the commercial developments of the area. I am not dealing with those described as "pilots" who are permanently aboard the vessel.[12]

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11. Rules of Oleron, *supra* n. 3, 30 F. Cas. at 1180. Art. XXIV requires a pre-lethal protection to the errant pilot since the imminence of loss of his head made it important that the pilot "must be sure he had not wherewith to make satisfaction." *Id.* at 1180-81.

12. The Observation on Arts. XXIII and XXIV, Rules of Oleron, the authorship of which is unknown, points out:

> Observation on the Two Foregoing Articles.
>
> The original calls these pilots "locmen"; for when those laws were written, there were officers aboard all ships, called pilots, who went the whole voyage, whereas the locmen were like our pilots, mariners hired at every river to guide the ship; for, dwelling on the place, the locmen was supposed to know the shore better than the ship's pilot, who perhaps was never there before; for which reason he commonly required the master to have a locmen, to avoid rocks, shelves, shoals and sands, which he must be well

All Agree Role of Pilot is Clear

One of the most authoritative resumes is that of D. Bederman's article on Compulsory Pilotage.[13] He states:

> For as long as men have taken to the sea, pilots have guided their journeys. Pilots were known to antiquity, and rules for their conduct were provided as early as Roman times and the Middle Ages. The first instance of mandatory pilotage was probably made in the ordonances de Wisbuy ... propounded ... in the twelfth century.
>
> The rationale for compulsory pilotage is straightforward enough. Navigation in and out of ports and harbors, and within restricted waters, poses special hazards that are not presented when sailing on the high seas. . . . Foreign vessels that are unfilmiliar with local conditions require a navigator skilled and knowledgeable in those ways.[14]

(Footnote 12 continued)

> acquainted with by long using the river: that of Roan is very dangerous on this account, and there are sworn pilots every two leagues to guide ships up the Seine. They are very necessary all over Brittany. The forty-fourth and fifty-nineth articles of the Ordinances of Wisbuy, oblige the master to take a new pilot, if his own and the ship's crew demand one of him. The master finds him maintenance, and the merchant pays him, by the sixtieth article of the Ordinances of Wisbuy. The loss of the pilot's head, if through his ignorance or negligence the ship is lost, is taken from the Consolato, c.250,—and answers to that known maxim in the law, 'Qui non habet in aere, luet in corpore.'

Rules of Oleron, *supra* n. 3, 30 F.Cas. at 1181.

13. Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*, 64 Tul.L.Rev. 1033 (1990) [hereafter, Compulsory Pilotage]; *see id.* at 1041 n. 21.

14. *Id.* at 1041-42 (footnotes omitted).

Congress Has Legislated on Pilots

Congress in its very first year was both conscious of the system of state-imposed compulsory pilotage and the need for the national government to permit the continuation of this system when it adopted the Act of August 7, 1789.[15]

By this Act Congress recognized the applicability of state compulsory pilotage statutes until Congress legislated specifically. It did so when Congress passed the Act of 2d of March 1837[16] restricting the rights of adjoining states by authorizing the master to accept a pilot certificated by any of the adjacent states.

Supreme Court Spoken Often, Consistently on Pilots

The Court first spoke in *Cooley* upholding the constitutionality of the Act of 1789.[17]

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15. *See supra* n. 8. This was the subject of *Cooley v. Board of Wardens, supra* n. 7.

16. Quoted in *Cooley, supra* n. 7, 53 U.S. at 317, 13 L.Ed. at 1004.

> "That it shall and may he lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters, to any law, usage, or custom to the contrary notwithstanding."

(Codified as amended at 46 U.S.C. § 8501(b).)

17. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States, and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution. *Id.* at 316, 13 L.Ed. at 1003.

The Court was emphatic that it realized both the importance of state-imposed compulsory pilots and their importance to the free flow of commerce:

> Now, a pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, *is the temporary master charged with the safety of the vessel* and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies most important and responsible place among those thus engaged.[18]

Though engaged and on board only temporarily, the pilot is supreme in his sphere:

> It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different states, or between ports of the United States and foreign countries; but if he is on board for such a purpose and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to *him while thus engaged,* as *clearly as it would if he were to remain on board throughout the whole passage,* from port to port.[19]

Even more recently the Court in *Bisso* gives contemporary vitality to these propositions:

> Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. . . . Under law and

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18. *Id.* (emphasis added).

19. *Id.* at 316, 13 L.Ed. at 1003-04 (emphasis added).

custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. . . . As a rule, *no employer, no person can tell them how to perform their pilotage duties.* When the law does not prescribe their duties, pilots are usually free to act on their own best judgment while engaged in piloting a vessel.[20]

Then came actions beginning with the Act of 1852,[21] culminating in the Act of 1871 and 1873.[22] By these actions Congress legislated that all coastwise vessels, be piloted by a federally licensed pilot, and free from state compulsory piloting statutes in the coastwise trade. Continued application of state compulsory pilotage laws for vessels under Registry[23] touching or engaging in commerce at a foreign port was mandated.

Legal Rights of Pilots and
Consequences of Pilot Negligence

To stimulate compliance with the constitutionally upheld local compulsory pilotage laws, "another tack was adopted. Vessels entering or leaving a port were required to pay a pilotage fee whether the shipmaster accepted a pilot

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20. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 93-94, 75 S.Ct. 629, 634, 99 L.Ed. 911, 919 (1955) (emphasis added).

21. Act of Aug. 30, 1852, chap. 106 (10 Stat. 61), cited in *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 196, 32 S.Ct. 626, 629, 56 L.Ed. 1047, 1052 (1912), pertained not to harbor pilots, but to those entitled such and serving continuously on board as a part of the ship's company.

22. Act of Feb. 28, 1871, chap. 100 (16 Stat. 440); Act of Dec. 1, 1873, 52 R.S. §§ 4401, 4444, U.S.Ccmp.Stat.1901, pp. 3016, 3037; cited in *Anderson*, 225 U.S. at 190-94, 197, 32 S.Ct. at 627-28, 56 L.Ed. at 1048-49, 1052.

23. Vessels in foreign trade, i.e., between or touching foreign ports, must be Registered. Those in the coastwise trade (not including via the Panama Canal) are Enrolled or Licensed. *Id.* at 199, 32 S.Ct. at 630, 56 L.Ed. at 1053.

or not."[24] Not only does the pilot have a lien *in rem* for pilotage services, and also for tendered but refused services,[25] *The China*[26] holds the ship liable *in rem* although not *in personam*[27] for pilot errors.

Equally demanding is the holding that failure to take a compulsory pilot renders the vessel unseaworthy in a cargo damage case.[28]

II.

A Pilot is a Jones Act Seaman

Thus we have seen: Pilotage has been the subject of immediate legislative concern and action; by it Congress, in recognition of the indispensability of pilots, has constitutionally authorized state laws compelling, under pain of criminal sanction, the use of state licensed pilots on vessels under Registry; the presence of a licensed pilot is so important that the law of unquestioned authority as declared by the Supreme Court holds the pilot in supreme command over master and crew so that the pilot's orders can only be countermanded in the face of obvious, glaring incompetence and neglect; the failure to have on board a com-

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24. *Compulsory pilotage, supra* n. 13 at 1043 and n. 29 (referring to *Ex parte McNiel*, 80 U.S. (13 Wall) 236, 279, 20 L.Ed. 624 (1871) (1681 Ordinance of Louis XIV penalized such a violation with corporal punishment)).

25. *Anderson, supra* n. 21 (negligence of a compulsory pilot gives rise to a maritime lien against the offending vessel).

26. 74 U.S. (7 Wall) 53, 19 L.Ed. 67 (1868) (holding vessel liable *in rem* for negligence of compulsory pilot); and *see, Compulsory Pilotage, supra* n. 13, at 1058 n. 111, and 1059.

27. *See* G & B, *supra* n. 3, at 599 n. 25, and accompanying text (citing *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 21 S.Ct. 831, 42 L.Ed. 1155 (1901)); and *id.* at 520 nn. 133-36, and accompanying text.

The harshness of this result is ameliorated by the Extension Admiralty Act, 46 U.S.C. App. & 740; *see* G & B, *supra* n. 3, at 523 n. 151.

28. *The Framlington Court*, 69 F.2d 300, 304 (5th Cir.1934).

pulsory pilot subjects the vessel to substantial civil liabilities.

In the face of these formidable factors, it is simply inconceivable that Congress, in that era (1915-1920) of its striving to afford effective statutory relief to all maritime workers, would exclude from the broad term "seaman" one so vital, so indispensable, so legislatively recognized as a compulsory pilot.

The Jones Act in its fullest state[29] extends its protection to seamen. Nowhere does the Act define who are *seamen.* Elsewhere Congress defines seaman in broad terms:

> (3) "seaman" means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed in any capacity on board a vessel.

46 U.S.C. § 10101.[30]

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29. 46 U.S.C.App. § 688:

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such action shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

. . . . .

(Amendments 1982 not applicable.)

30. This definition had its genesis in Act of Dec. 21, 1898, c. 28, §§ 23, 26, R.S. § 4612 (30 Stat. 762, 764)(codified prior to reenactment at § 10101 at 46 U.S.C.App. § 713), and was derived from Act of June 7, 1872, c. 322, § 65, 17 Stat. 277.

The legislative history of the Jones Act is scarce indeed. All that appears has to do with venue provisions.[31]

Beginning its efforts in 1915, Congress enacted an omnibus statute which in the eyes of *Gilmore and Black* was a patent misreading of *The Osceola's*[32] emphasis on the fellow servant doctrine. Playing tit for tat the Court in *Chelentis v. Luckenbach S.S. Co.*[33] held the 1915 Act ineffective for not having legislatively ordained *respondeat superior.*

Certainly the Supreme Court has given the Jones Act the broadest sweep.[34] To begin with there is *International Stevedoring Company v. Haverty*[35] in which Justice Holmes, in his "words are flexible" approach held

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31. *See Brown v. C.D. Mallory & Co. et al.*, 122 F.2d 98, 102 n. 8 (3d Cir. 1941) (en banc):

> The controversial sentence of Section 20 was added as a result of the action of a conference committee of the Senate and House of Representatives. See 59 Cong. Record, Part 7, p. 7044, and House Report 1093, 66th Congress, 2nd Session. In the "Statement of the Managers on the Part of the House", p. 35 of the report just mentioned, appears the following in respect to the amendment, "This amendment amends Section 20 of the seaman's act so as to extend the Federal Employers' Liability Act to cases of personal injury to or death of seamen. The House recedes with an amendment that jurisdiction of all actions brought under the provisions of Section 20 shall be under the court of the district in which the defendant employer resides or in which his principal office is located." We can find no reference in the debates of either House to the statute under consideration. It seems to have been dealt with entirely in committee. The language of the report, however, is really no broader than that of the statute.

32. 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903).

33. 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918).

34. *See* G & B, *supra* n. 3, at 325-33.

35. 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).

a longshoreman to be a Jones Act seaman. So the Court did in *Senko v. LaCrosse Dredging Corp.*,[36] *Grimes v. Raymond Concrete Pile Co.*,[37] *Butler v. Whiteman*,[38] and *Gianfala v. Texas Co.*[39]

Within six months of the *Haverty* decision Congress enacted the Longshoremen's and Harborworkers Compensation Act (LHWCA),[40] which extended compensation benefits to all maritime workers except masters and "members of a crew of [a] vessel." The Court in *Swanson v. Marra Bros.*[41] held "the effect of these [LHWCA] provisions is to confine the benefits of the Jones Act to members of the crew of a vessel plying navigable waters."

This has given rise to frequent expressions capsulated in Judge Rubin's opinion for us, *Guidry v. South Louisiana Contractors, Inc.*[42] that the terms "seaman" and "member of a crew" are now used interchangeably.

But considering the indispensable nature of the calling of a compulsory state pilot, the interchange of "seaman" and master and "member of a crew of a vessel" ought not to cut off a pilot from being under the congres-

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36. 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957).

37. 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed.2d 737 (1958).

38. 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958).

39. 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955).

40. Act of Mar. 4, 1927, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.*

42. 614 F.2d 447, 452, n.2.

The term "seaman" is contained in the original Jones Act enacted in 1920. In 1927 Congress enacted the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901 *et seq.*, which extended to all maritime workers except masters or "members of a crew of [a] vessel." *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946). The terms "seaman" and "members of a crew" are now used interchangeably.

sional contemplation of seaman in 1920. A pilot is no stranger to navigation and operation of an ocean-going vessel. A pilot is not one incidental to the maintenance of maritime commerce in the *Executive Jet*[43] or world-wide operational sense. Indeed his/her work is the very essence of maritime commerce.

Certainly a pilot is a full-fledged member of the ship's company. And looking at it from 1920 and 1927 viewpoints, Congress did not mean to exclude from the protection of the Jones Act compulsory pilots while aboard and directing the navigation of a vessel. Nor does my analysis ignore or disparage Judge Wisdom's creative contribution of *Robison*[44] leading principally to the en banc in *Barrett,*[45] nor its insistence upon some more or less permanent relation to a vessel or identified group of vessels. *Robison* was borne principally out of that great class of non-descript floating craft and myraid operations in the exploration and development of off-shore oil activities.

A compulsory pilot is in no sense comparable to those incidentally related to a vessel. Such pilot is indispensable. The vessel may not operate without him/her. That pilot is in supreme command of the basic function of the vessel—to navigate in maritime commerce. That person is a seaman or he/she is nothing.

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43. *Executive Jet Avaiation v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *see also, Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).

44. *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959).

45. *Barrett v. Chevron,* 781 F.2d 1067 (5th Cir. 1986) (en banc), now the subject of review in the pending grant of certiorari in *McDermott International, Inc. v. Wilander,* 887 F.2d 88 (5th Cir. 1989), *cert granted,* — U.S —, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990).

III.

In Agreement With Court's Other Holdings

I agree there is no § 903(b) negligence liability in the boarding ladder, failing to administer resuscitations or on *Sieracki* unseaworthiness.

My dissent ends as it began: the unjustifiable exclusion of a state compulsory pilot as a Jones Act seaman.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Filed Oct 18 1988

HELEN BACH, ET AL.	Civil Action
VERSUS	No. 87-5900
TRIDENT SHIPPING CO., INC., ET AL.	Section "J"

Order and Reasons

CARR, J.

This matter came before the Court for hearing on Wednesday, October 12, 1988 on defendants' motion for [partial] summary judgment [to dismiss plaintiffs' Jones Act and unseaworthiness claims]. At the hearing, the Court GRANTED the motion; the Court now gives written reasons for its ruling.

Apparently, no court in this Circuit has yet addressed whether the Jones Act or the general maritime warranty of seaworthiness applies to compulsory river pilots on the Mississippi River. Today, this Court holds that neither applies to such persons.

I.

Plaintiffs are the wife and surviving children of decedent, Eugene Bach Jr., who allegedly suffered a fatal heart attack on December 26, 1986 aboard the M/V

DATE OF ENTRY OCT 19 1988

JAYMAT TRIDENT, which was owned and operated by defendent Trident Shipping Co., Inc. and under a voyage charter to defendant Kaiser Aluminum and Chemical Corp.

Decedent was self-incorporated, was a member (a general partner, according to his tax return) of the Crescent River Port Pilots' Association, and was the compulsory pilot the Association assigned to navigate the JAYMAT TRIDENT downriver from New Orleans to Pilot Town. According to the deposition of decedent's son, who is also a river pilot, decedent was *not* a member of the JAYMAT TRIDENT's crew and, as a pilot, was considered an independent contractor.

Plaintiffs have sued Trident and Kaiser *in personam* as well as the JAYMAT TRIDENT *in rem* and allege that negligence of Trident and Kaiser and unseaworthiness of the JAYMAT TRIDENT (specifically, concerning defects in the pilot's ladder and lack of adequate medical attention) caused decedent's death.

II.

Defendants now move to dismiss plaintiffs' Jones Act and unseaworthiness claims, leaving just a § 905(b) general maritime negligence claim. Defendants make two arguments: first, that decedent was not an employee of either Trident or Kaiser; and second, that decedent was not a seaman as to either Trident or Kaiser in general or to the JAYMAT TRIDENT in specific. The Court agrees with both arguments.

A. *An Employee?*

It is now well established that an employer-employee relationship is essential for recovery under the Jones Act,

46 U.S.C. § 688. *E.g., Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224 (5th Cir. 1975), *clarified on other grounds*, 546 F.2d 675 (5th Cir. 1977).

Decedent's son, the river pilot, states by affidavit that defendants had a right to refuse decedent's services, could have discharged decedent, and paid decedent's "wages." None of these points, however, is inconsistent with defendants' position, to which decedent's son admitted in his deposition, that decedent was acting as an independent contractor through his Pilots' Association. *Cf. The CHINA*, 74 U.S. (8 Wall.) 53, 67-68, 19 L.Ed. 67 (1868) (the master may discharge a compulsory pilot, whom the vessel must pay). *Contrast Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) (affirming a Jones Act verdict in favor of plaintiff/river pilot, who had worked directly for the defendant over one year and was paid a monthly salary by the defendant; stating that that particular plaintiff "was permanently assigned as a pilot to one or another of defendant's tugboats"); *see also Daughdrill v. Diamond M Drilling Co.*, 447 F.2d 781, 784 (5th Cir. 1971) (characterizing the plaintiff in *Pace* as "the salaried pilot [under] . . . his employer's specific instructions"), *cert. denied*, 405 U.S. 997, 92 S. Ct. 1261, 31 L.Ed.2d 466 (1972). *See generally* C. Black & G. Gilmore, *The Law of Admiralty* § 7-16, at 520 (2d ed. 1975) ("A pilot may be taken on voluntarily *or* under the compulsion of some local statute or regulation. The *voluntary* pilot is in much the same position as any other crew member." (emphasis added)).

Plaintiffs' effort to characterize the pilot fee as "wages" is insufficient to create a question of fact as to employee status. The elaborate statutory fee schedule and mandatory use of river pilots further support defendants' position. *See generally* La. RSA §§ 34:941-:1127 (West 1985

& West Supp. 1988).

As the Supreme Court stated:

> Pilots hold a unique position in the maritime world and have been regulated extensively both by the States and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under the law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties.

Bisso v. Inland Waterways Corp., 349 U.S. 85, 93-94, 75 S. Ct. 629, 634, 99 L.Ed. 911 (1955) (footnotes omitted). For example, unlike ordinary agents such as employees, compulsory river pilots in Louisiana are immune from liability to vessel owners and others—save for gross negligence or willful misconduct, claims for which only the Board of River Port Pilot Commissioners may hear. *See* La. RSA § 34:1001 (West Supp. 1988).

In sum, the Court holds that compulsory pilots in general are not covered by the Jones Act as to those whose vessels they pilot and that decedent in specific was not covered by the Jones Act as to Trident or Kaiser.

B. *A Seaman?*

The test for seaman status is also well established in this Circuit. For a person to be found a seaman, it must be established (1) that he was assigned permanently to a

vessel in navigation or performed a substantial part of his work aboard a vessel or a fleet of vessels *and* (2) that his work contributed to the function of the vessel or to the accomplishment of its mission. *Offshore Co. v. Robison,* 266 F.2d 769, 779 (5th Cir. 1959), *reaff'd en banc Barrett v. Chevron, U.S.A., Inc.,* 781 F.2d 1067, 1073-74 (5th Cir. 1986).

The question of seaman status is generally a jury question; where there is no reasonable basis to support a jury finding on the issue of seaman status, however, summary judgment denying seaman status is proper. *E.g., Lormand v. Superior Oil Co.,* 845 F.2d 536, 539 (5th Cir. 1987), *cert. denied sub nom. Lormand v. Aries Marine Corp.,* ____ U.S. ____, 108 S. Ct. 739, 98 L.Ed.2d 774 (1988).

At issue is whether plaintiffs can satisfy the first prong of the *Robison* test. The record is absolutely devoid of any evidence that decedent was assigned permanently to the JAYMAT TRIDENT or performed a substantial part of his work aboard the JAYMAT TRIDENT or aboard a fleet of vessels owned by or having any connection with Trident or Kaiser. *Contrast Magnolia Towing,* 378 F.2d at 13. While it is probable that most, if not all, of decedent's work was done aboard vessels, such is insufficient to show that decedent was assigned to a *fleet* of vessels belonging to or having some connection to Trident or Kaiser (or, for that matter, any other single company), for the Fifth Circuit uses this term of art to mean "any group of vessels acting *together* or under *one* control." *Barrett,* 781 F.2d at 1074 (emphasis added). There is no evidence in the record that decedent's connection with any of the defendants was anything but transitory. *See id.* & n.9.

Because a plaintiff bears the burden to establish seaman status, the Court may not presume, without any

evidence on the point, that decedent served as a pilot only on the JAYMAT TRIDENT or only on vessels owned by or having even the most remote connection with Trident or Kaiser. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986) (where non-moving party bears the burden of proof on an issue for which summary judgment is sought, that party must oppose the motion with admissible evidence on the issue in order to defeat the summary judgment motion).

Plaintiffs argue that even if decedent was not a seaman, the rule under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099 (1946) (extending the warranty of seaworthiness to non-seamen), still survives as to river pilots despite the 1972 LHWCA amendment legislatively overruling *Sieracki* as to persons covered by the LHWCA, *see* 33 U.S.C. § 905(b). Plaintiffs overlook this Circuit's rule that a marine worker is either a seaman or an LHWCA employee. *E.g., Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977, 982 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1013, 98 L.Ed.2d 978 (1988); *see* 33 U.S.C. § 902(3)(G) (LHWCA does not cover "a master or member of a crew").

In sum, the Court holds that decedent was not a seaman as to Trident or Kaiser or to the JAYMAT TRIDENT.[1]

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[1] Plaintiffs cite *Clark v. Solomon Navigation, Ltd.*, 631 F. Supp. 1275 (S.D.N.Y. 1986) (no Jones Act claim allowed, but an unseaworthiness claim allowed by a river pilot) and *Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp. 301 (D. Or. 1987) (following *Clark*), *aff'd without published opinion*, 848 F.2d 1243 (9th Cir. 1988). While holding that the plaintiff did not satisfy the permanent-assignment prong of the *Robison* test for Jones Act purposes, *Clark* disregards this same fact for the unseaworthiness claim in order to conclude that the plaintiff was not covered by the LHWCA on grounds of being a crew member;

III.

For these reasons, the Court dismisses plaintiffs' Jones Act and unseaworthiness claims. The sole remaining claims are plaintiffs' general maritime negligence claims, which survive under § 5(b) of the LHWCA, 33 U.S.C. § 905(b).

New Orleans, Louisiana, this 18th day of October, 1988.

/s/ Patrick E. Carr
UNITED STATES DISTRICT JUDGE

Footnote 1 continued.

further, *Clark* does not apply this Circuit's rule that every marine worker is either a seaman or an LHWCA worker.

Plaintiffs also cite Longshoremen's Act Opinion No. 22, 1928 A.M.C. 263 (1927), which states that a pilot is a "member of a crew of a vessel." While valid under limited circumstances, *see, e.g., Magnolia Towing*, 378 F.2d 12, the opinion likewise fails to address *Robison*'s permanent-assignment requirement.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

Mar 27 89

HELEN EHRET BACH, ET AL.	Civil Action
VERSUS	No. 87-5899
TRIDENT SHIPPING CO., INC., ET AL.	Section "J"

JUDGMENT

Considering the Court's Order and Reasons of March 27, 1989,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that there be judgment against all plaintiffs (Helen Ehret Bach, Eugene G. Bach III, and Janet B. Lashley) and in favor of all defendants (Trident Shipping Co., Inc.; Kaiser Aluminum and Chemical Corp.; and the JAYMAT TRIDENT, *in rem*, her engines, tackle, appurtenances, equipment, etc.), dismissing plaintiffs' complaint with prejudice at their costs.

New Orleans, Louisiana, this 27 day of March, 1989.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY MAR 28 1989

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

March 27 89

HELEN EHRET BACH, ET AL. Civil Action

VERSUS No. 87-5899

TRIDENT SHIPPING CO., INC., ET AL. Section "J"

Order and Reasons

CARR, J.

This matter is before the Court on defendants' motion for summary judgment. By minute entry of March 16, 1989, the Court took the motion under submission on the briefs. For the following reasons, the Court now GRANTS the motion.

I.

On December 26, 1986, Eugene G. Bach Jr. suffered a fatal heart attack while aboard the M/V JAYMAT TRIDENT as a compulsory river pilot. His surviving wife and two children have sued the vessel owner, the voyage charterer, and the vessel for his death.

Bach was a 61 year old male who had worked as a river pilot for about 36 years; he was a member of the Crescent City River Pilots Association, whose members serve as compulsory river pilots on the Mississippi River

DATE OF ENTRY MAR 28 1989

between New Orleans and Pilottown.[1] Among his normal duties as a pilot were climbing pilot, or Jacob's, ladders[2] and climbing flights of stairs from the main deck of a vessel up to the wheelhouse of a vessel.

On December 26, 1986, Bach was to serve as the compulsory river pilot aboard the JAYMAT TRIDENT, an oceangoing bulk cargo vessel that is registered in and flies the flag of the Cayman Islands and whose officers are all Chinese. Early that morning, Bach was transported to the JAYMAT TRIDENT by a pilot boat, the M/V LITTLE RAY. The LITTLE RAY is equipped with two vessel boarding platforms affixed at the top of its wheelhouse; these platforms stand 11 feet 1½ inches above the waterline.

To board the JAYMAT TRIDENT, Bach stepped from one of the LITTLE RAY's boarding platforms onto a pilot ladder hanging on the port side of the JAYMAT TRIDENT and then climbed the ladder;[3] according to the vessel log, he boarded the vessel at 2:30 a.m. At that time,

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[1] Although some spell this location as two words (viz., "Pilot Town"), *see, e.g., Cenac Towing Co. v. Keystone Shipping Co.*, 404 F.2d 698, 700 (5th Cir. 1968), *aff'g In re Cenac Towing Co.*, 276 F. Supp. 317, 320 (E.D. La. 1967), the preferred spelling appears to be as one word (viz., "Pilottown"). *See, e.g.*, 33 C.F.R. § 110.195(a)(2) (1987); La. R.S. § 34:996(A) (West Supp. 1989) *Allied Chemical Corp. v. Hess Tankship Co. of Delaware*, 661 F.2d 1044, 1047 (5th Cir. Unit A 1981) (Brown, J.).

[2] A pilot, or Jacob's, ladder is a rope ladder, generally with wooden steps, used to board larger vessels. *See, e.g., Nye v. A/S D/S Svendborg*, 501 F.2d 376, 378 n.2 (2d Cir. 1974), *cert. denied sub nom. The Svendborg v. Marine Engine Specialties Corp.*, 420 U.S. 964, 95 S. Ct. 1356, 43 L.Ed.2d 442 (1975).

[3] The record before the Court does not indicate how the top of the pilot ladder was attached to the vessel—whether it was attached directly to the side of the vessel or instead by way of a short accommodation ladder or some other means.

the deck of the JAYMAT TRIDENT stood 32.36 feet (9.86 meters) above the waterline. Thus, Bach had to climb on the pilot ladder a distance of at most about 21 1/4 feet.

Once aboard, Bach climbed four flights of stairs from the main deck to the vessel's wheelhouse, from which pilots would direct the vessel. When he reached the wheelhouse, he replaced the New Orleans/Baton Rouge compulsory pilot, Lewis H. Taylor, who then proceeded down the same stairs to disembark by the same pilot ladder. Soon thereafter (according to the vessel log, it was 2:32 a.m.), Bach suddenly collapsed to the floor.

According to Captain Jao Chih-ping's deposition, the quartermaster, who was in the wheelhouse when Bach collapsed, notified the captain, who returned to the wheelhouse; the captain tried to lift Bach, but was unable because Bach was unconscious; the captain then called back Taylor to resume piloting the vessel, asked Taylor to call the Coast Guard for medical help, and gave orders to drop anchor immediately; the second mate, who was the designated medical officer, came to the wheelhouse and, at Taylor and the captain's request, watched over Bach to see that no one tripped over him in the dark. According to Taylor's deposition, he returned to the wheel, took control of the navigation (according to the vessel log, it was 2:24 a.m.), and, while he was maneuvering the vessel to anchor, asked a crewmember to check Bach's pulse; the crewmember apparently found no pulse.

There is no evidence that either Taylor or any crewmember attempted to perform cardiopulmonary resuscitation (CPR) or to give other direct first aid to Bach, other than what is set forth above.

According to the vessel log, the Coast Guard did not

arrive until 3:15 a.m. and emergency medical service technicians (para-medics) not until at 3:30 a.m. Their efforts to save Bach were to no avail; he was dead.

The Orleans Parish Coroner's Office performed an autopsy on Bach later that morning. It found that he had "severe stenotic calcific coronary atherosclerosis [with] recent ischemic myocardial changes." It classified his death as "natural." To paraphrase plaintiffs' expert medical report in layman's terms, Bach had a very acute heart disease and died from a heart attack.[4]

At his deposition, plaintiffs' medical expert, Dr. John H. Phillips Jr., testified (1) that the greater the physical stress Bach experienced just before his collapse, the greater was the likelihood that such stress played "an increasing role in his death" and (2) that a person climbing a ladder must exert more physical stress when such climbing requires the use of both hands and feet than when such climbing requires only the use of feet.[5] Further, he testified that Bach's chances of survival would have been greater had he received CPR within four minutes of his collapse, but added that even if a crewmember had administered CPR and even if ideal professional medical attention had been available minutes after his collapse, the likelihood that Bach would have died anyway way 85% or greater. To quote Dr. Phillips' report: "his chances for ultimate survival were clearly not very favorable . . . and the prognosis following even the ideal scenario as outlined

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[4] Specifically, the report states that Bach had "advanced occlusive coronary artery disease" and "suffered the onset of ventricular tachycardia and then ventricular fibrillation which ultimately resulted in his death." At his deposition, plaintiffs' medical expert more fully explained these conditions and their effects on Bach.

[5] *Cf. Browne v. Makin*, 177 F.2d 753, 756 (5th Cir. 1949) ("a Jacob's ladder . . . require[s] full use of [a person's] hands, arms, and feet").

[in the report] would be poor."

Defendants now move for summary judgment on three points:[6] (1) plaintiffs cannot establish legal causation from Bach's having to use a pilot ladder; (2) defendants owed no duty to apply CPR or other first aid to Bach; and (3) plaintiffs cannot establish legal causation from any inadequate medical attention on the crew's part because, according to plaintiff's own medical expert, the chances of Bach's dying even if he had had the best medical attention as soon as he collapsed were more probable than not.

II. *The ladder*

Plaintiffs argue that defendants should have provided Bach with an angled accommodation ladder[7] instead of a vertical pilot ladder for the access all the way from the pilot boat to the JAYMAT TRIDENT. As sole support, they cite SOLAS Regulation 17(a)(ii) for Safety of Navigation:

> Ships engaged on voyages in the course of

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[6] Plaintiffs argue that the motion is untimely. While the motion was brought after the Court's initial cut-off date, the Court exercised its discretion by granting defendants specific leave to bring the instant motion. *See Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1357 (5th Cir. 1983). *See generally* F.R.Civ.P. 16(b) (scheduling orders may be modified on good cause shown).

[7] For the Fifth Circuit's description of one accommodation ladder, see *Lamar v. Admiral Shipping Corp.*, 476 F.2d 300, 301 (5th Cir. 1973) ("The vessel was equipped with an aluminum accommodation ladder or gangway approximately thirty feet long and thirty inches wide with thirty steps. It was affixed to a turntable at the top with a through bolt, and the turntable was held in place with through bolts and plate. The base rested level on the cement apron of the dock on a roller. The steps were level."). For other descriptions and definitions, see *Nye*, 501 F.2d at 378 n.1; D. Tver, *Ocean and Marine Dictionary* 2 (1979).

> which pilots are likely to by employed shall comply with the following requirements:
> (a) *Pilot Ladders*
>
> . . . .
>
> (ii) The ladder shall be secured in a position so . . . that the pilot can gain safe and convenient access to the ship after climbing not less than 1.5 metres (5 feet) and not more than 9 metres (30 feet). ... Whenever the distance from sea level to the point of access to the ship is more than 9 metres (30 feet), access from the pilot ladder to the ship shall be by means of an accommodation ladder or other equally safe and convenient means.[8]

This regulation has been codified at 46 C.F.R. § 96.40-1(g) for cargo vessels "that normally embark[ ] a pilot from a pilot boat or other vessel"

> Whenever the distance from the water's edge to the point of access is more than 30 feet, access from a pilot ladder to the vessel must be by way of an accorrodation ladder or equally safe and convenient means.[9]

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[8] International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), ch. V. regulation no. 17(a)(ii), *done* Nov. 1, 1974, 32 U.S.T. 47, 243, T.I.A.S. No. 9700, at ____ (entered into force for the United States on May 25, 1980; not ratified by the Caymen Islands), *reprinted at* 6B *Benedict on Admiralty* Doc. No. 14-8, at 14-400 (7th ed. 1987).

[9] 46 C.F.R. § 96.40-1(g)(1987) (for "cargo and miscellaneous" vessels); *accord id.* § 32.90-1(g) (for tank vessels); *id.* § 77.40-1(g) (for passenger vessels); *id.* § 108.719(g) (for "mobile offshore drilling units operating under the U.S. flag"); *id.* § 195.40-1(g) (for oceanographic research vessels).

Because the Cayman Islands is not a signatory to SOLAS 1974, the CFR regulation applies to the JAYMAT TRIDENT, at least while it is within U.S. navigable waters. *See* 46 C.F.R. § 90.05-1(a).

Plaintiffs do not otherwise argue that the pilot ladder Bach climbed was defective or below industry or statutory standards in any way or that defendants or anyone else should have known that Bach or anyone else might suffer a heart attack from climbing this or any other pilot ladder. Nor do they present any evidence that Bach had any injury or accident while climbing or difficulty in climbing this pilot ladder or that Bach or anyone else had at any time complained about having to climb this or any other pilot ladder.

All parties agree that at least one of the two essentially identical regulations applies to the JAYMAT TRIDENT, whose freeboard for the period at issue exceeded 30 feet. The parties diverge, however, on the interpretation of the regulations.

Neither the SOLAS nor the CFR regulation requires that a ship is to extend an accommodation ladder from the ship all the way to a pilot boat whenever a pilot embarks the ship; specifically, the regulations do not read: "whenever a vessel's freeboard exceeds 30 feet, access from *another vessel* must be by way of an accommodation ladder, and no other means." Instead, the regulations merely require that access from *a vessel's pilot ladder* to its deck be by way of an accommodation ladder *or other safe means.*[10] In other words, the regulations specifically contemplate just what was in use on the JAYMAT TRIDENT, namely, the use of pilot ladders for vessels whose freeboards exceed 30 feet. In sum, there is no evidence that

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[10] For a description of this two-part arrangement, see *Nye*, 501 F.2d at 378 n.1. As indicated above in footnote 3, the record does not reveal how the pilot ladder was attached to the vessel. This information, however, is irrelevant: plaintiffs do not complain about the means by which the pilot ladder was connected to the deck and present no *evidence* that the means in use, whatever it was, was unsafe or had any causal connection to Bach's death.

defendants violated these regulations.[11]

Further, common sense rejects plaintiffs' position. To a large degree, as any seafarer knows, a vessel (especially a smaller vessel) often has little control over the everyday effects of waves and currents; even if a person knows the average size of waves at a given time or is very familiar with a given current, he rarely can foretell exactly how a particular wave or current may affect a vessel at any particular moment—just when and how far a vessel may rise, sink, rock, approach, or veer from a particular point. Seafarers must learn to compensate for these random, predictably unpredictable movements; thus is the art of navigation. Activities on and between vessels must anticipate the possibilities that natural phenomena often affect two near-by vessels very differently. Unlike accommodation ladders with their rigid frames more suitable for ship-to-shore movement when a vessel is tied down, pilot ladders are specially designed for the fluctuations in midstream vessel-changing operations such as those where a pilot boards a moving ship from a moving pilot boat.[12] Indeed, Judge Brown of the Fifth Circuit has commented

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[11] It is a separate issue whehter an intended purpose of these regulations was to protect persons from over-exertion or instead whether the sole purpose of these regulations was to protect persons from falling or slipping or being struck by other objects. Because the Court finds no violation of these regulations, the Court need not address this separate issue.

[12] If a swell causes the pilot boat suddenly to rise or rock, or to shift its lateral position, relative to the larger vessel, then a rigid ladder could knock into someone or something with considerable force or quickly move away from a person attempting to board it. The examples are numerous, the point is the same: these dangerous problems are less likely to occur with a flexible rope ladder than with a long rigid projection from a large vessel.

that the use of pilot ladders is "routine."[13]

Because plaintiffs do not otherwise argue any violation of a statutory provision concerning ladders[14] and do not otherwise produce any evidence of a duty or custom for defendants to use an accommodation ladder that extends all the way from the JAYMAT TRIDENT to the LITTLE RAY or any evidence of negligence on the part of defendants in not using such a ladder, no basis of liability may lie for defendants' failure to provide such an accommodation ladder.

As plaintiffs concede,[15] climbing pilot ladders and several flights of stairs is a normal and customary part of any river pilot's job.[16] While the ordinary exertion and stress from the climb may have been what triggered Bach's heart attack, " '[a] heart attack due to . . . physical exertion and stress, which are an integral part of a [pilot's] work, is not a harm that can reasonably be anticipated or guarded against.' "[17] In other words, such exertion and stress was

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[13] *See S/S Bethflor v. Thomas*, 364 F.2d 634, 635 n.4 (5th Cir. 1966); *see also Garcia v. Dover Shipping Co.*, 380 F. Supp. 607, 609 (E.D. Pa. 1974) ("A Jacob's ladder is of widespread use for boarding ships."), *aff'd without published op.*, 511 F.2d 1392-93 (3d Cir. 1975).

[14] The SOLAS regulation at issue does provide that a pilot be able to gain access to a ship after climbing not more than 30 feet. Here, however, it is undisputed that Bach did not have to climb more than 30 feet in travelling from the LITTLE RAY to the main deck of the JAYMAT TRIDENT.

[15] *See* Pre-Trial Order, ¶ 7(4), at 8.

[16] *See Browne*, 177 F.2d at 766.

[17] *Melanson v. Caribou Reefers, Ltd.*, 667 F.2d 213, 214 (1st Cir. 1981) (per curiam) (affirming a summary judgment dismissing a widow's general maritime negligence claim for the wrongful death of her longshoreman husband) (quoting *Raymond v. I/S Caribia*, 626 F.2d 203, 206 (1st Cir. 1980), *cert. denied*, 451 U.S. 969, 101 S. Ct. 2045, 68 L.Ed.2d 348 (1981)).

not from any negligence on defendants' part.

In sum, there is no evidence of a genuine dispute that defendants were at all responsible for Bach's heart attack.[18]

III. *CPR and first aid*

The sole remaining basis for liability is the alleged failure to provide adequate, timely first aid to Bach when he collapsed.[19]

Defendants assert that they owed no duty to provide first aid to Bach; in support, they cite "the general tort rule that no one has a duty to go to the assistance of another."[20] While defendants accurately describe the majority state law rule, general maritime law imposes at least a minimal duty on the facts here: a vessel that takes aboard a person—be he even a passenger or guest—owes that person "a duty to exercise 'reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances.' "[21] To the extent that a

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[18] *Cf. Carlton v. M/G Transport Services, Inc.*, 698 F.2d 846, 848 (6th Cir. 1983) (per curiam) (affirming a directed verdict for defendant who had no prior knowledge of decedent seaman's heart condition, where decedent died of a heart attack while at work on defendant's vessel).

[19] *See Cities Service Oil Co. v. Launey*, 403 F.2d 537 (5th Cir. 1968) (upholding wrongful death Jones Act award, where "[p]laintiff did not allege that decedent's heart attack was caused by Defendant, but rather [by] the failure of Defendant to provide prompt and adequate medical attention for a man who was obviously ill and unable to care for himself while aboard the ship.").

[20] *Lazzell v. Booker Drilling Co.*, 816 F.2d 196, 198 (5th Cir. 1987).

[21] *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988); *see Walsh v. Zuisei Kaiun K.K.*, 606 F.2d 259, 262 (9th Cir. 1979) (ship owed

ship's crew voluntarily attempts more than is legally required to save a person in danger, "liability for negligent salvage is limited to situations in which the salvor, through want of due care, has worsened the position of the victim."[22]

In opposition to defendants' motion, plaintiffs present evidence that prudent crewmen may well have done considerably more than did the JAYMAT TRIDENT's crew. Specifically, they present evidence that a prudent master or officer would have been familiar with CPR techniques[23]—the inference being that at least one such

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Footnote 21 continued.

drowning compulsory pilot a duty of rescue, even where there was no negligence on its part for the incident that created the need for the rescue); *cf. Theodories v. Hercules Navigation Co.*, 448 F.2d 701, 703 n.6 (5th Cir. 1971) (reversing judgment for widow whose husband died of a heart attack aboard a vessel, but noting that the vessel did owe him "the maritime duty of due care"). *But see Wilcox v. Carina Maritime Corp.*, 586 F. Supp. 1475, 1479 (E.D. Tex. 1984) (there is no legal duty for a ship's crew to aid a longshoreman who suffers a heart attack on the ship).

As support for the duty to provide aid to Bach, plaintiffs cite 46 U.S.C. § 2303(a), which applies when "a vessel [is] involved in a marine casualty." The statute appears not to apply here, where the JAYMAT TRIDENT itself was not in any danger (viz., where there was no vessel collision, allision, grounding, power failure, etc.). *See Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1430 (9th Cir. 1985); *cf. Publicover v. Alcoa Steamship Co.*, 168 F.2d 672, 677 (2d Cir. 1948) (former 33 U.S.C. § 367, upon which § 2303 is based, did not impose a duty on a vessel owner whose vessel was not in a collision). In any event, subsection (c) of the statute makes it clear that the statutory duty is the same as the general maritime duty described in *Barbetta*, namely, reasonable care under the circumstances. *See Berg*, 759 F.2d at 1430.

[22] *Grigsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969), *certs. dism'd*, 396 U.S. 1033, 90 S. Ct. 612-13, 24 L.Ed.2d 531 (1970).

[23] For this evidence, plaintiffs cite provisions of two international conventions that require masters and chief officers to have certain minimal

person would have recognized Bach's predicament and immediately attempted to give him CPR, even in the emergency situation where the whole vessel was in danger because there was no pilot at the wheel. This evidence is enough to create a genuine dispute whether the captain and crew acted reasonably in the actions they took, that is, whether defendants breached their duty of care to Bach.[24]

It is a separate issue, however, whether this genuine

Footnote 23 continued.

knowledge of medical care and first aid techniques. *See* International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, App. to Reg. 11/2, § 13, *done* July 7, 1978 (entered into force for the United States on Apr. 28, 1984; not ratified by the Cayman Islands), *reprinted in* 6(A) *Benedict on Admiralty* Doc. 9-38, at 9-199 (7th ed. 1985); Convention Concerning Health Protection and Medical Care for Seafarers, art. 9(2), *done* Oct. 1987, I.L.O. No. 164 (not yet entered into force), *reprinted in* 6(A) *Benedict on Admiralty* Doc. 9-9, at 9-40 to 9-40.1 (7th ed. 1988). Further, they supply an expert report by a pilot/marine consultant, Dean Bruch, who all but explicitly states that any ship's officers should know how and when to administer CPR.

Defendants argue that neither convention applies here since the JAYMAT TRIDENT flies the flag of the Cayman Islands, which has ratified neither convention. The Court notes that these conventions, even if not applicable of their own force, may perhaps be evidence of universal custom among oceangoing vessel officers, but that the relationship between custom and conventional international law—exactly what is needed to establish international custom—is hotly debated. Because of Bruch's report, the Court need not address these issues.

[24] With Captain Jao's deposition testimony that he and Taylor asked the second mate "to examine the collapsed [pilot]—take a look to care of him," plaintiffs suggest that defendants may have voluntarily assumed to do more than was legally required. The Court need not decide whether this evidence is sufficient to support their suggestion, for there is no evidence, as required under *Grigsby* for a "good samaritan" to be liable under general maritime law, that any crewmember placed Bach in any worse position than he would have been otherwise.

dispute is one concerning a *material* fact.[25] It is not enough for plaintiffs to prove the breach of a duty; they must also prove by a preponderance of the evidence that such breach was a proximate cause of Bach's death.

Under general maritime law,[26] plaintiffs cannot establish that improper medical attention was the proximate cause of a person's death unless they prove that " 'a proper diagnosis and treatment . . .*would likely have prevented* the loss of this life.' "[27]

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[25] *See Williams v. Adams*, 836 F.2d 958, 961 (5th Cir.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)), *reh'g denied mem.*, 844 F.2d 788 (5th Cir. 1988); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) ("a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

[26] Plaintiffs argue that Louisiana law applies. This is plainly wrong. *See e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S. Ct. 406, 408, 3 L.Ed.2d 550 (1959). Thus, the court does not address whether Louisiana courts would extend the "loss of chance at survival" doctrine, *see Hastings v. Baton Rouge General Hospital*, 493 So. 2d 713, 720 (La. 1986), beyond the narrow confines of medical malpractice actions governed by La. R.S. § 9:2794 (A)(3). *See Agoff v. Town of Jean Lafitte*, 464 So. 2d 847, 850 (La. App. 5th Cir. 1985) (affirming jury verdict for defendant, where he was negligent per se in rendering ambulance care to a fatal heart attack victim, but where there was insufficient evidence to show that it was more likely than not that the victim would have survived had the defendant rendered proper care). *See generally* Annotation, *Medical Malpractice: "Loss of Chance" Causality*, 54 A.L.R.4th 10 (1987). This Court has not found a single maritime case where this rule has been applied against any defendant.

[27] *Rewis v. United States* [*Rewis III*], 503 F.2d 1202, 1204-05 (5th Cir. 1974) (quoting *Rewis I*, 369 F.2d 595, 599 (5th Cir. 1966) (citing *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173, 4 L.Ed.2d 142 (1959))) (emphasis added in *Rewis III*), *reh'g denied*, 506 F.2d 1386 (5th Cir. 1975) (per curiam). While New Mexico law was the governing law in *Rewis*, the Fifth Circuit, in citing to *Sentilles*, looked to general maritime law for its authority on the issue of medical causation.

Plaintiffs' own medical expert testified that even if a crewmember had immediately applied CPR to Bach and even if a professional medical crew had boarded the ship immediately thereafter to apply further medical attention, the chances of Bach's dying anyway were, to a reasonable degree of medical certainty, 85% or greater.[28] In other words, the only evidence before the Court shows that it was more probable than not that Bach would have died no matter what treatment was given to him. Thus, it is immaterial that optimal medical attention might have slightly improved Bach's chances of survival.[29]

Footnote 27 continued.

Compare Barrios v. Waterman Steamship Corp., 290 F.2d 310, 311 (5th Cir. 1961) (affirming judgment for defendant, where decedent seaman disappeared overboard; holding that even if defendant was negligent in not acting quickly enough, such was insufficient for a basis of liability where there was "a complete want of evidence tending to show that [the missing seaman] . . . might have been rescued") *with Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284, 287 (4th Cir. 1962) (directing judgment for widow of drowned seaman effort, where "there [was] a reasonable possibility of rescue" had defendant not been negligent in its rescue efforts).

[28] This 85% figure was based on Dr. Phillip's assumption that the paramedics would have brought certain equipment (viz., an electrical defibrillator) with them on the ship; there was no evidence that the paramedics who did arrive had such equipment. Dr. Phillips testified that without such equipment, the chances of survival are less than 5% even with CPR.

In his expert report for plaintiffs, Bruch states that Bach's chances of survival would have been 30% had CPR been commenced within four minutes of his collapse. While the difference between 85% and 70% is immaterial for purposes of this motion, the Court notes that Bruch's report shows no indication that he has any medical expertise and thus that he is qualified to give such an opinion. *See generally* F.R.Ev. 702.

[29] *Wilcox*, 586 F. Supp. at 1480; *see Fitzgerald v. Manning*, 679 F.2d 341, 356 & n.14 (4th Cir. 1982) (applying Virginia law, but noting that the "federal rule" is the same).

In sum, plaintiffs have not presented sufficient evidence to create a genuine dispute of material fact whether any improper medical attention on defendants' part was a proximate cause of Bach's death. Thus, summary judgment for defendants is proper.

IV.

For these reasons,[30] the Court dismisses plaintiffs' complaint with prejudice at their costs. Judgment shall enter accordingly forthwith. The Court directs all counsel to advise all witnesses under subpoena for trial that the trial is cancelled.

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[30] By Order and Reasons of October 18, 1988, adhered to Minute Entry of November 4, 1988, ___ F. Supp. ___, the Court dismissed plaintiffs' Jones Act and unseaworthiness claims on the ground that Bach was neither an employee nor a seaman as to any of the defendants. The instant Order and Reasons does not depend in any way on the earlier Order and Reasons and would not differ if Bach had been a Jones Act seaman of any of the defendants.

Because the Court dismisses plaintiffs' complaint on other grounds and because defendants do not raise these issues in their motion, the Court does not address the following several issues:

(1) Whether plaintiffs have standing to maintain their suit, *see generally Neal v. Barisich, Inc.*, ___ F. Supp. ___, ___ n.1 (E.D. La. 1989) (Carr, J.) (discussing personal representatives);

(2) what damages, if any, may be sought on behalf of the decedent's two adult children, *see Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir.), *reh'g denied mem.*, 775 F.2d 301 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019, 106 S. Ct. 1205, 89 L.Ed.2d 318 (1986); *Truehart v. Blandon* [*Truehart I*], 672 F. Supp. 929, 934 n.5 (E.D. La. 1987); *Neal*, ___ F. Supp. at ___ & nn.38-39;

(3) whether the complaint states a cause of action against the voyage charterer, *see Balfer v. Mayronne Mud & Chemical Co.*, 762 F.2d 432, 435 (5th Cir. 1985); and

(4) whether plaintiffs have made an effective Rule 9(h) designation, which precludes them from receiving a jury trial, *see Truehart v. Blandon* [*Truehart III*], 685 F. Supp. 956, 959 (E.D. La. 1988).

New Orleans, Louisiana, this 27 day of March, 1989.

/s/ Patrick E. Carr

UNITED STATES DISTRICT JUDGE